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No. 02-1326

In the Supreme Court of the United States

ROBERT A. MICK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, under 19 U.S.C. 1615, probable cause to seize property in connection with forfeiture proceedings is determined as of the date of seizure or as of the date of the forfeiture hearing.

2. Whether a 12-month delay between the seizure of petitioner's property and the filing of a civil forfeiture complaint violated petitioner's due process rights.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	8
Conclusion	15

TABLE OF AUTHORITIES

Cases:

United States v. *Daccarett*, 6 F.3d 37 (2d Cir. 1993), cert. denied, 510 U.S. 1191 (1994)	9
United States v. *$874,938.00 in U.S. Currency*, 999 F.2d 1323 (9th Cir. 1993)	13
United States v. *$8,850 in U.S. Currency*, 461 U.S. 555 (1983)	12, 13, 14
United States v. *$405,089.23 in U.S. Currency*, 122 F.3d 1285 (9th Cir. 1999)	8
United States v. *Mick*, 263 F.3d 553 (6th Cir. 2001)	2, 3, 4, 5, 6, 10, 11, 12
United States v. *$91,960.00*, 897 F.2d 1457 (8th Cir. 1990)	8
United States v. *One 1974 Learjet 24D*, 191 F.3d 668 (6th Cir. 1999)	9
United States v. *Parcels of Property*, 9 F.3d 1000 (1st Cir. 1993)	8
United States v. *Premises & Real Property at 492 S. Livonia Rd.*, 889 F.2d 1258 (2d Cir. 1989)	9
United States v. *$67,220.00 in U.S. Currency*, 957 F.2d 280 (6th Cir. 1992)	6, 9
United States v. *Turner*, 933 F.2d 240 (4th Cir. 1991)	13
United States v. *$292,888.04 in U.S. Currency*, 54 F.3d 564 (9th Cir. 1995)	13, 14

Constitution, statutes and rule:	Page
U.S. Const.:	
Amend. IV	7
Amend. V (Double Jeopardy Clause)	7-8
Civil Asset Forfeiture Reform Act, 18 U.S.C. 981 *et seq.*	9
18 U.S.C. 981(a)(1)(A)	2
18 U.S.C. 983(a)(3)(D)	10
18 U.S.C. 983(c)	9
18 U.S.C. 983(c)(2)	10
18 U.S.C. 1955	2
18 U.S.C. 1955(d)	2, 11
18 U.S.C. 1956	2
18 U.S.C. 1957	2
19 U.S.C. 1615	8, 9, 10
Supp. Admirality & Maritime Claims R. E(2)	9

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OPINIONS BELOW

The order and bench opinion of the court of appeals (Pet. App. 1a-8a) are not published in the Federal Reporter, but the judgment is noted at 52 Fed. Appx. 252. The memorandum opinion and order of the district court (Pet. App. 9a-27a, 28a-29a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 6, 2002. The petition for a writ of certiorari was filed on March 6, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On May 29, 1997, and June 2, 1997, FBI agents executed a search warrant and seized numerous items of

personal property belonging to petitioner. On May 27, 1998, the government filed a civil forfeiture complaint against several of those items of property, namely, $689,036.91 in United States currency, two securities accounts (valued at approximately $161,704 at the time of seizure), two vehicles, and miscellaneous electronic equipment. The complaint alleged that petitioner operated an illegal gambling business, in violation of 18 U.S.C. 1955, and that the defendant properties were subject to forfeiture under 18 U.S.C. 1955(d). The complaint further alleged that the defendant properties were involved in money laundering transactions, in violation of 18 U.S.C. 1956 and 1957, and were subject to forfeiture under 18 U.S.C. 981(a)(1)(A).

On July 29, 1999, following petitioner's criminal conviction on illegal gambling and money laundering charges, see *United States* v. *Mick*, 263 F.3d 553, 557 (6th Cir. 2001), the government moved for summary judgment in the civil forfeiture proceeding. On October 1, 1999, petitioner filed a cross-motion for summary judgment. On July 11, 2001, the district court granted the government's motion for summary judgment and denied petitioner's motion. Pet. App. 9a-27a. The court of appeals affirmed. *Id.* at 1a-8a.

1. Petitioner was a bookmaker who resided on Westwood Street in Alliance, Ohio. Before May 1997, petitioner operated his bookmaking business from a trailer at 1505 East State Street in Alliance. The trailer had several telephone lines, including one devoted to a fax machine. Between March 20, 1997, and May 18, 1997, the FBI ran a court-ordered pen register on those lines. The register traced over 3400 calls on the fax machine (98% outgoing), 4000 calls on one telephone line, and over 2400 calls on another (90% incoming). See *Mick*, 263 F.3d at 558. During that time, petitioner received

more than 50 fax transmissions a day and more than 100 incoming telephone calls a day, most which were for a short duration. To increase the number of his betting customers, petitioner had Cheryl Stoiber, a friend from Louisville, Kentucky, maintain an extra telephone line at her home. A call-forwarding service on this line allowed Louisville bettors to make local calls that would be patched through to petitioner's trailer. *Ibid.*

Petitioner took bets from individual bettors and other bookmakers on practically all major sporting events, especially football, baseball, and basketball games. In addition to placing bets for themselves, other bookmakers would place "layoff bets" with petitioner to limit their exposure when their customers bet heavily on one participant in a sporting event. At any given time, petitioner had between 30 and 40 individual bettor clients and at least 9 bookmaker clients. See *Mick*, 263 F.3d at 558.

Petitioner paid $5000 a year to receive a line service from Don Best Sports, which provided up-to-the-minute information on odds, statistics, game information, and other matters of interest to sports bettors. During the football season, he prepared "parlay slips" containing weekly game schedules and point spreads that were sold to customers and employees of various local businesses, including a bar known as the M & M Sports Club in Sebring, Ohio, and B.J.'s Car Wash in Alliance, Ohio. See *Mick*, 263 F.3d at 559.

2. In February 1995, Ohio state police officers and the Stark County, Ohio, Sheriff's Office began investigating petitioner's gambling enterprise. Over several years, the state police and eventually the FBI conducted surveillance of petitioner's activities. They observed petitioner visiting the M & M Sports Club and B.J.'s Car Wash, among other locations, and on two

occasions saw men counting money as they left the sports club while petitioner was inside. Officers examined the club's trash and discovered parlay sheets and betting slips. *Mick*, 263 F.3d at 559.

On May 27, 1997, FBI agent Michael Mihok prepared a 15-page affidavit in support of a request for a warrant to search petitioner's house, trailer, and safety deposit box. Three confidential informants provided information for the affidavit. One source told Agent Mihok that petitioner was operating a gambling business from his trailer, which included six bookmakers working for petitioner, as well as his sons and girlfriend; that petitioner was providing line information to bookmakers and distributing parlay sheets; and that petitioner had a line service and a computer on which he kept his records. A second source provided essentially the same information. Agent Mihok's affidavit stated that both sources had "proven to provide accurate information in the past." *Mick*, 263 F.3d at 559-560.

The affidavit stated that Agent Mihok's third source had "direct knowledge" of petitioner's bookmaking activity. Agent Mihok stated that the third informant was reliable because, *inter alia*, he had never been involved in criminal activity, he had not had past contact with law enforcement, he had been steadily employed for 11 years and was a model citizen, and his only motive was to assist law enforcement. According to the affidavit, the third source was at B.J.'s Car Wash while a friend of his was placing bets with one of petitioner's bookmakers. The friend told the source that the bookmaker had a wagering log, that some of his bettors were police officers, and that the bookmaking enterprise was operated from petitioner's trailer. *Mick*, 263 F.3d at 560.

Agent Mihok's affidavit also included a detailed description of the results of the pen register; a description of the results of the officers' surveillance of petitioner, including his visits to the sports club and the car wash and his meetings with known bookmakers; and a description of the results of the examination of the sports club's trash. And it set forth the agent's knowledge of the business practices of operators of gambling enterprises, including their maintenance of detailed ledgers and records, their hiding of large amounts of currency in their residences or places of business, and their use of computers to store data from their gambling businesses. *Mick*, 263 F.3d at 560.

On the basis of Agent Mihok's affidavit, a magistrate judge issued a search warrant for petitioner's house, trailer, and safety deposit box. FBI agents executed the warrant on May 29, 1997, and June 2, 1997. In petitioner's home, the FBI discovered bank records, gambling records, and almost $550,000 in cash. The trailer yielded more gambling records, computer hardware, telephone equipment, and utility bills. In petitioner's safety deposit box, the agents found, *inter alia*, $127,000 in cash and four silver bars. *Mick*, 263 F.3d at 560; C.A. App. 8.

3. Before his criminal trial, petitioner moved to suppress the evidence seized from his home and trailer, challenging, *inter alia*, the sufficiency of Agent Mihok's affidavit on the ground that it contained material misstatements of the results of police surveillance of petitioner and otherwise failed to show probable cause to search. The district court denied the motion, and the court of appeals affirmed. See *Mick*, 263 F.3d at 562-566. With respect to the alleged misstatements in the affidavit, the courts concluded that "[t]he evidence before this court, even if construed in favor of the defen-

dant, cannot be understood to show that Agent Mihok gave either a knowingly false affidavit or otherwise acted in bad faith." *Id.* at 564. With respect to the question of probable cause to search petitioner's trailer and residence, the courts concluded that there was "much more than sufficient evidence to find a fair probability that contraband would be present." *Id.* at 562.

4. Meanwhile, the government and petitioner both moved for summary judgment in the civil forfeiture proceeding. A magistrate judge recommended that the government's motion be granted and that petitioner's motion be denied. Pet. App. 10a. The district court accepted that recommendation and granted the government's motion for summary judgment. *Id.* at 11a. The court first rejected petitioner's claim that the magistrate judge had erred in concluding that petitioner's criminal conviction collaterally estopped him from contending that he had not been engaged in a criminal gambling business. *Id.* at 14a-17a. Next, relying on *United States* v. *$67,220.00 in United States Currency*, 957 F.2d 280, 284 (6th Cir. 1992), the court rejected petitioner's claim that the magistrate judge had erred in deciding that probable cause to support a forfeiture is to be established at the time of the forfeiture hearing, not at the time of seizure. Pet. App. 17a. The court also rejected petitioner's claim that the magistrate judge had erred in concluding that the case did not present an issue of material fact with respect to probable cause. *Id.* at 17a-19a.

The district court also rejected petitioner's claim that the one-year delay between the seizure of his property and the filing of the forfeiture complaint violated his due process rights. Pet. App. 23a-24a. The court reasoned that (1) the one-year delay was not excessive in light of similar cases; (2) the government was entitled

to press ahead with its criminal investigation of petitioner before filing its civil complaint; (3) petitioner had offered no evidence that the government had deliberately delayed the civil forfeiture proceeding in order to build a case against him; and (4) petitioner himself had waited ten months before asserting a claim to the seized property. *Id.* at 24a. Finally, the court rejected petitioner's claims that the forfeiture proceeding had violated his right to be free from double jeopardy, and that the seizure of his property had violated his rights under the Fourth Amendment. *Id.* at 25a-27a.

5. The court of appeals affirmed by bench opinion. Pet. App. 1a-7a. Relying on case law holding that probable cause to support a forfeiture may be determined at the time of the forfeiture proceedings, the court summarily rejected petitioner's claim that probable cause should be determined at the time of seizure. *Id.* at 5a. Similarly, relying on its disposition of petitioner's direct appeal in his criminal case, the court summarily rejected his contention that the seizure violated his Fourth Amendment rights. *Ibid.* Finally, the court found "unavailing" petitioner's claim that the government's delay in filing the forfeiture complaint had violated his due process rights. *Id.* at 6a. The court noted that petitioner "took no steps to accelerate" the forfeiture process, and that its review of relevant case law had shown "numerous cases in which similar or longer delays were held not to violate due process." *Ibid.* The court concluded that "under these circumstances, we believe that the district judge got it right and we affirm." *Ibid.*[*]

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[*] The court of appeals also rejected petitioner's claims that the forfeiture proceeding violated his rights under the Double Jeop-

ARGUMENT

1. Petitioner contends (Pet. 4-5) that review should be granted because the courts of appeals disagree on whether, under 19 U.S.C. 1615, probable cause to support a forfeiture may be determined at the time of the forfeiture hearing as opposed to at the time that the government filed its forfeiture complaint. Petitioner is correct that the courts of appeals have disagreed about the meaning of 19 U.S.C. 1615. The disagreement, however, has now been resolved by Congress, and it does not warrant this Court's review.

Under Section 1615, the burden of proof is on the person claiming an ownership in the property against which the forfeiture action was brought, provided "[t]hat probable cause shall be first shown for the institution of such suit or action." Some courts of appeals, led by the Ninth Circuit, have held that Section 1615 requires dismissal of a forfeiture complaint unless the government shows that it had probable cause *at the time it filed the complaint.* See, *e.g.*, *United States* v. *$405,089.23 in United States Currency*, 122 F.3d 1285 (9th Cir. 1997) (holding that the government could not rely on a drug dealer's conviction or evidence adduced at the criminal trial to establish probable cause where the forfeiture complaint was filed at the time of indictment); see also *United States* v. *Parcels of Property*, 9 F.3d 1000, 1003-1004 (1st Cir. 1993) (holding that Section 1615 places "a preliminary burden [on the government] to show that it had probable cause *to institute* the forfeiture proceeding"); *United States* v. *$91,960.00*, 897 F.2d 1457, 1462 (8th Cir. 1990) ("[E]vidence to support the probable cause determination includes not only evi-

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ardy Clause, and that the government had not established probable cause to support the forfeiture. Pet. App. 5a-6a.

dence obtained before the seizure of the property subject to forfeiture but also evidence obtained up until the point at which the government institutes forfeiture proceedings."). Other courts of appeals have rejected that reading of Section 1615, holding instead that the government is free at the forfeiture hearing to rely on evidence acquired after the filing of the complaint, and that the only requirement for the complaint is that it satisfy the "particularity" requirement of Supplemental Admiralty and Maritime Claims Rule E(2). See, *e.g.*, *United States* v. *Daccarett*, 6 F.3d 37, 47 (2d Cir. 1993) (complaint need not meet ultimate trial burden of establishing probable cause; it need only establish "reasonable belief that the government can show probable cause for forfeiture at trial") (citation omitted), cert. denied, 510 U.S. 1191 (1994); *United States* v. *Premises & Real Property at 4492 S. Livonia Rd.*, 889 F.2d 1258, 1268 (2d Cir. 1989) (same); *United States* v. *One 1974 Learjet 24D*, 191 F.3d 668, 674 (6th Cir. 1999) (holding that probable cause for seizure and probable cause for forfeiture are different concepts; government does not have to establish probable cause for forfeiture until the time of trial; court may not dismiss complaint on ground that the government lacked probable cause for seizure); *United States* v. *$67,220.00 in United States Currency*, 957 F.2d 280, 284 (6th Cir. 1992) (same).

In 2000, Congress enacted the Civil Asset Forfeiture Reform Act (CAFRA), 18 U.S.C. 981 *et seq.*, which substantially revised the laws governing civil forfeiture. Among other things, CAFRA changed the government's burden of proof for civil forfeiture actions from probable cause, the standard under 19 U.S.C. 1615, to proof by a preponderance of the evidence. 18 U.S.C. 983(c). Congress, moreover, directly resolved the conflict in the circuits related to Section 1615 by making

clear that the government may prove its case at the forfeiture hearing based on evidence acquired *after* the filing of the forfeiture complaint, see 18 U.S.C. 983(c)(2) ("[T]he Government may use evidence gathered after the filing of a complaint for forfeiture to establish, by a preponderance of the evidence, that property is subject to forfeiture."), and that the lack of probable cause at the time the government initiated the forfeiture proceeding does not warrant dismissal of the complaint, see 18 U.S.C. 983(a)(3)(D) ("No complaint may be dismissed on the ground that the Government did not have adequate evidence at the time the complaint was filed to establish the forfeitability of the property."). Accordingly, any disagreement among the courts of appeals with regard to Section 1615 is of little and diminishing significance, and does not require this Court's resolution.

Even if the issue had significance, this case is a poor vehicle for resolving any conflict over Section 1615. As both the record in this case and the court of appeals' decision in petitioner's direct appeal of his criminal conviction reflect, the government had ample probable cause not only at the time of the forfeiture hearing, but also at the time it filed the forfeiture complaint (and, for that matter, at the time the property was originally seized). See *Mick*, 263 F.3d at 565-566. Under any interpretation of Section 1615, therefore, the government satisfied its burden of showing probable cause.

For example, the affidavit by Agent Mihok supporting the search warrant detailed more than sufficient evidence to conclude that petitioner's trailer and the material seized inside it were connected to petitioner's illegal gambling activities. Three separate, reliable informants had identified the trailer as the center of petitioner's illegal gambling enterprise, and

many of the informants' statements had been independently verified by police officers; the police had observed petitioner associating with known gambling figures; and they had discovered "parlay sheets" prepared by petitioner for the purpose of facilitating illegal betting at various local businesses. The officers also had strong evidence through the court-ordered pen registers on the trailer's telephone lines that the trailer was being used for gambling activities. See *Mick*, 263 F.3d at 565-566. That evidence was more than sufficient to establish a "fair probability" that items of property seized from the trailer pursuant to the warrant issued by the magistrate judge would be subject to forfeiture as proceeds of petitioner's "illegal gambling business." *Ibid.*; see 18 U.S.C. 1955(d).

The same is true of the property seized from petitioner's home. The officers had overwhelming evidence that petitioner was at the center of a major illegal gambling enterprise. Although most of that evidence was more directly linked to petitioner's trailer, as the court of appeals in petitioner's direct appeal of his criminal convictions concluded, there was also sufficient probable cause to link petitioner's residence to that illegal activity. In particular, Agent Mihok's affidavit in support of the search warrant detailed his extensive "experience that those who operate gambling businesses store money and records in their residence, even if their home is separate from their principal place of business." *Mick*, 263 F.3d at 566. Moreover, gamblers "often possess large sums of currency," which is "often hidden or concealed in hiding places at ther residences." *Ibid.* Here, it was particularly reasonable to believe that petitioner would store money and other materials related to his gambling enterprise at his residence because his trailer was located in an exposed location

and was often unoccupied. *Ibid.* As the district court that denied petitioner's motion to suppress concluded, "it would not be reasonable for a person engaged in betting to leave large sums of cash or other betting materials at what appears to be an unguarded trailer on a busy road with seemingly no one living at this trailer." *Id.* at 562. Accordingly, because it was "reasonable to conclude that [petitioner's] residence would contain gambling records and money," *id.* at 566, it was also reasonable to conclude that such records would establish that the money and other items of property at petitioner's residence represented forfeitable proceeds of his illegal gambling business.

2. Petitioner also contends (Pet. 6-7) that review is warranted because the one-year delay between the seizure of his property and the filing of the forfeiture complaint violated his due process rights. Petitioner's fact-specific contention lacks merit. The delay between the seizure of petitioner's property and the filing of the forfeiture complaint neither violated his due process rights nor presents an issue of general importance warranting review by this Court.

In *United States* v. *$8,850 in United States Currency*, 461 U.S. 555 (1983), this Court observed that dilatory conduct by the government in initiating civil forfeiture proceedings may violate a claimant's due process rights. The Court said that in balancing the interests of the claimant and the government, four factors should be considered: (1) the length of the delay; (2) the reason for the delay; (3) the claimant's assertion of his right to a judicial determination of his interest in the seized property; and (4) prejudice to the claimant. See *id.* at 564-569.

As for the first factor, the one-year delay in this case is small in comparison to delays found reasonable in

similar cases. In *$8,850 in United States Currency* itself, the Court found that an 18-month delay did not violate the claimant's due process rights. 461 U.S. at 569; see *United States* v. *Turner*, 933 F.2d 240, 246 (4th Cir. 1991) (after balancing four factors from *$8,850 in United States Currency*, court concludes that 16-month delay not unreasonable); *United States* v. *$292,888.04 in United States Currency*, 54 F.3d 564, 567 (9th Cir. 1995) (after balancing same factors, court finds that 30-month delay between seizure and initiation of civil forfeiture proceeding did not offend due process).

Nor do the other three factors identified in *$8,850 in United States Currency* weigh in petitioner's favor. One of the reasons for the delay was to allow the government adequate time to determine whether petitioner's assets should in fact be forfeited. The government was required to complete the administrative process of providing notice to petitioner, referring the case to the proper agency, and evaluating the results of its investigation. See *$8,850 in United States Currency*, 461 U.S. at 565 ("Both the Government and the claimant have an interest in a rule that allows the Government some time to investigate the situation in order to determine whether the facts entitle the Government to forfeiture so that, if not, the Government may return the money without formal proceedings."). In addition, as the Court has recognized (*id.* at 567), the pending criminal proceedings against petitioner presented similar justifications for delay in beginning civil forfeiture proceedings, because "[a] prior civil suit * * * may provide improper opportunities for the claimant to discover the details of a contemplated or pending criminal prosecution." See *United States* v. *$874,938.00 in United States Currency*, 999 F.2d 1323, 1325-1326 (9th Cir. 1993) (finding similar delay reasonable). Petitioner

has made no showing that the government failed to proceed with diligence in this case. And he has neither alleged nor shown that the delay between the seizure and the forfeiture proceeding affected his ability to contest the merits of the forfeiture or otherwise prejudiced him.

In particular, the third factor identified in *$8,850 in United States Currency* weighs heavily against petitioner. He did not file his "Complaint for Return of Property" until March 31, 1998—ten months after his property was seized—and he voluntarily dismissed it two months later. C.A. App. 68, 79. A claimant's own delay in seeking the commencement of judicial forfeiture proceedings can be a significant factor in determining that a delay in the initiation of those proceedings did not violate due process. See *$292,888.04 in United States Currency*, 54 F.3d at 567 (where claimant failed for 18 months to seek return of property, 30-month delay between seizure and initiation of forfeiture proceeding, while lengthy, was not unreasonable and did not offend due process); cf. *$8,850 in United States Currency*, 461 U.S. at 568-569 (claimant able to trigger rapid filing of forfeiture action if he desires it; failure of claimant to use available remedies suggests that he did not desire early judicial hearing).

Accordingly, consistent with the relevant considerations identified by this Court in *$8,850 in United States Currency*, the court of appeals correctly ruled (Pet. App. 6a), that petitioner had not shown that this delay violated his due process rights. And in any event, because petitioner's due process claim is tied to the specific facts of his case, it does not present an issue of general importance warranting review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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